BEFORE THE ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	
Columbia Gulf Transmission Company	PSD Appeal No. 88-11
ID No. 105-0640-0021	
Applicant	

ORDER ON MOTION FOR STAY

Before me is a motion filed by the permit applicant, Columbia Gulf Transmission Company, and the permit issuer, the State of Kentucky, which are jointly requesting a stay of the proceedings on EPA Region IV's appeal from the State's permit determination. [SEE FOOTNOTE 1] If a stay is granted, the applicant intends to supplement the state administrative record with new factual information which the applicant believes will confirm the wisdom of the State's original permit determination. The information concerns site-specific costs relevant to the State's determination of "best available control technology" (BACT) for the proposed facility. This information was not in the administrative record of the original BACT analysis of the

[FOOTNOTE 1]. Currently, an order granting review of the State's permit determination has been issued. Columbia Gulf Transmission Company, PSD Appeal No. 88-11 (Order dated June 21, 1989). The order specifies that the briefing period will commence upon the State's publication of the Agency's decision granting review of the State's permit determination. The State has yet to give the required notice that triggers commencement of the briefing period.

facility, a fact which prompted EPA Region IV to file its appeal of the permit determination alleging, inter alia, that evidence of these costs would be needed to support the State's BACT determination. In their motion, the State and the permit applicant express the belief that staying the proceedings would be the most expeditious means of disposing of this case; they claim that a remand, for example, would not be desirable because it might trigger an entirely new and, presumably, time-consuming public review and comment period under 40 CFR Section 124.19. The proposed stay mechanism, on the other hand, would circumvent this process, but only if the State determines, after evaluating the new information, that the original permit determination was correct (and therefore does not require change). The stay, as proposed, would restrict opportunity to comment on the new information to the Region, which was the only commenter on the original permit determination. The movants reason that there is no logical basis for soliciting comment from the public since it previously had the opportunity -- but did not exercise it -- to comment on precisely the same permit conditions. (The movants appear to concede the necessity, however, of soliciting comment from a broader audience if the State's review produces a substantially revised permit.)

In opposing the motion, the Region makes several arguments. First, it argues that the administrative record is already closed and the applicant

should not now be permitted to submit information it should have submitted 1 and a half years ago when Kentucky

was in the process of developing the draft permit determination. According to the Region,

> [t]he Applicant has failed to explain its failure to provide this information on a timely basis. Applicant's allegation that Kentucky did not require such information, even if accurate, is no justification for this omission, especially in light of the timely comments from Petitioner [Region IV] that a detailed, source-specific analysis was required. Applicant responded to the Region's comments by a letter dated August 12, 1988, but still failed to provide the necessary information. Consequently, at this late date such information should not be included in the record put before the Administrator for review.

Region's Response at 2.

This argument is not cause for denial of the motion. It is true the regulations contemplate a permit decision being made on the basis of the administrative record as it exists at the close of the comment period on the draft permit, see, e.g., 40 CFR Section 124.18(b) (1); and it is also true the permit applicant's additional information may have been in existence or readily available on or before that date (thus seeming to eliminate most legitimate excuses for not submitting the information earlier). Nevertheless, it does not appear to me that the regulations are inflexible in this respect, [SEE FOOTNOTE 2] or that any prejudice would result from granting the motion (the Region, for example, does not claim

---

[FOOTNOTE 2] It is well settled that an administrative agency must follow procedures set forth in its own regulations. E.g., United States ex rel Accardi v. Shaughnessy, 347 U.S. 260, 74 S.Ct. 499 (1954); Service v. Dulles, 354 U.S. 363, 77 S. Ct. 1152 (1959). Of course, if no prejudice results or if some greater interest is served, an exception to this requirement may be permitted. Taylor v. Maryland School for the Blind, 409 F. Supp. 148 (D.Md. 1976), aff'd 542 F.2d 1169 (4th Cir. 1976); see American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 539, 90 S.Ct. 1288, 1292, 25 L.Ed.2d 547, 553 (1970).

it will suffer any). Insofar as the possibility of prejudice to the public is concerned, it will not incur any because, under the movants' proposal, the public is given the right to comment if the permit is subsequently revised; and, if it is not revised, further public participation would be unnecessary since, as the movants correctly point out, the public has already had an opportunity to comment on the terms of the unrevised permit. [SEE FOOTNOTE 3]

In my opinion, if the State is willing to reopen the record to accept and review additional information, it should be the one to decide the matter in the absence of any prejudice to third parties. The purpose of closing the record to receipt of additional evidence is presumably to bring order to the decision-making process, enabling permit issuers such as the State to

---

[FOOTNOTE 3] The Region is guilty of overgeneralizing when it asserts that "no information should be reviewed by the Administrator which has not first been made available to the public for review and comment." Region Response to Motion at 3. The ultimate purpose of public comment is to determine whether the conditions of the permit should be changed. See, e.g., 40 CFR Section 124.13 (duty to raise issues pertaining to whether the "any condition of a draft permit is inappropriate"); 40 CFR Section 124.14 (reopened public comment period allows comments to be filed on "conditions" of the draft permit that are inappropriate); 40 CFR Section 124.19 (appeals are for review of permit "conditions"). Nothing in the statute, e.g., Clean Air Act Section 165(a) (2), 42 U.S.C.A. Section 7465(a) (2), or the regulations, e.g., 40 CFR Section 52.21(q), can reasonably be read as mandating solicitation of public comment on information. Therefore, if, as is possible under the movants' proposal, the new information might not prompt any alteration of the permit conditions, no legitimate purpose would

be served by soliciting public comment on the new information. The general public has already had an opportunity to comment on the permit's conditions. Further solicitation of public comment under these circumstances would be redundant. It suffices that the Region, as the sole petitioner contesting the terms and conditions of the permit, will have an opportunity to comment on the information.

manage their dockets efficiently and to bring finality to permit proceedings. In this manner, the permit issuer can avoid potentially endless rounds of delays and reconsideration of matters previously decided. Thus, so long as the permit issuer is willing to countenance the disruptions attendant to reopening the record, there is no apparent reason why the record has to be kept closed. I conclude therefore that this matter is principally one for the State to decide.

In opposing the motion, the Region also suggests that it should have the opportunity to submit new information on the appropriate level of control currently representing BACT for the applicant's turbine. The Region explains that in reviewing the PSD permit application, it tolled its assessment of available control technologies for BACT at the time the public comment period closed. [SEE FOOTNOTE 4] It therefore argues that if the record is subsequently reopened to admit new information supplied by the applicant, then the State must also "consider anew" what technology represents BACT. Region Response at 4. I agree, although "consider anew" perhaps exaggerates the State's obligation (better to say: the State will have to update its BACT

[FOOTNOTE 4] As explained in a previous decision,

> Absent unusual delay between the close of the public comment period and the date of permit issuance, or the presence of other extraordinary circumstances, the close of the public comment period can be used as the reference by which the adequacy of the administrative record is judged.

Pennsauken County Resource Recovery Facility, PSD Appeal No. 88-8, at 7, n. 11 (November 10, 1988).

determination after giving full consideration to the information submitted by both the applicant and the Region). The need to base the permit determination on current information is fundamental to any determination of "best available control technology," for old technologies are constantly being replaced by newer and more advanced ones; and in the absence of overriding considerations -- for example, those bearing on the orderly administration of the permit program -- information on the latest available technologies should ordinarily receive consideration. [SEE FOOTNOTE 5] Therefore, whenever the original permit application is being updated at the behest of the permit applicant, it is only fair that the applicant's new information be balanced with other contemporaneous information relevant to the BACT determination.

Accordingly, the parties' motion is granted, with the proviso that the State shall not only give the Region an opportunity to comment on the applicant's new information, but shall also permit the Region to submit additional information of its own to ensure that the BACT determination is fully

---

[FOOTNOTE 5] Appropriate allowances for delays inherent in issuing a permit are nevertheless necessary since, for example, there will always be some measure of delay between the close of the administrative record and the time when the final permit is actually issued. To this end, the Agency ordinarily considers the close of the public comment period on the draft permit as tolling the time for consideration of new technologies. See note 4 supra.

contemporaneous with the State's updating of the permit determination.

So ordered.

_____
William K. Reilly
Administrator

Dated: JUL 3 1990

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order on Motion for Stay in the matter of Columbia Gulf Transmission Company, PSD Appeal No. 88-11, were sent by First Class Mail to the following persons:

William C. Eddins, Director
Division for Air Quality
Commonwealth of Kentucky
Dep't. for Environmental Protection
18 Reilly Road
Frankfort, KY 40601

Susan Midyett
Columbia Gulf Transmission Company
3805 West Alabama Avenue
Houston, TX

Richard D. Baley
Manager of Design Engineering
Columbia Gulf Transmission Company
3805 West Alabama Avenue
Houston, TX

Daniel Ransbottom
Senior Consultant
Entrix, Inc.
P.O. Box 56288
Houston, TX 77256-6288

Michael H. Levin
Nixon, Hargrave, Devans and Doyle
One Thomas Circle
Washington, DC 20005

Alan E. Dion
Assistant Regional Counsel
U.S. EPA, Region IV
345 Courtland Street, NE
Atlanta, GA 30365

Bruce P. Miller, Director
Air Programs Branch
U. S. EPA, Region IV
345 Courtland Street, NE
Atlanta, GA 30365

Dated: JUL 9 1990

_____
Brenda H. Selden, Secretary
to the Chief Judicial Officer